

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.11.2018

CORAM : THE HONOURABLE Mr. JUSTICE N.SESHASAYEE

S.A No.546 of 2008
& MP.No.1 of 2008

Anjappa

...Appellant/Plaintiff

.Vs.

Thimmarayappa

...Respondent/Defendant

Prayer: This second appeal is filed under Section 100 of C.P.C against the Judgment and decree dated 16.11.2007 passed in A.S.No.22 of 2006 on the file of the Sub-Court, Hosur in reversing the Judgment and decree dated 28.11.2005 passed in O.S.No.243 of 1997 on the file of the District Munsif Court, Hosur.

For Petitioner : Mr.P. Mani

For Respondent : Mr.J. Hariharan for MR.V.Nicholas

JUDGMENT

The plaintiff/appellant has preferred this appeal challenging the decree of the First Appellate Court, which non-suited his suit for declaration of title and for injunction. Parties would be referred to by their rank before the trial Court.

2. The brief facts are: The plaintiff and the defendant are brothers. Their father was Chinna Venkata Ramanappa. On 14.12.1995, the plaintiff, the defendant and their father have partitioned the properties through a registered partition deed, wherein, Chinna Venkata Ramanappa was allotted A-schedule property, the defendant was allotted B-schedule property and the plaintiff was allotted C-schedule property. One of the items of the property involved in the partition is 49 cents of agricultural lands in S.No.332/3. In the partition deed, this property was included both in the B-schedule property allotted to the defendant and C-schedule property allotted to the plaintiff. Claiming exclusive right over the suit properties, the plaintiff has filed the suit.

3. This was opposed to by the defendant, but somewhere in his written statement he has agreed to share the property equally with the plaintiff.

4. The trial court decreed the suit, whereas the First Appellate Court reversed it. In reversing it, the First Appellate Court appears to have taken into consideration the oral testimony of the parties wherein they have disclosed that the parties intended to divide the properties equally, went on to analyse the total extent of property allotted to both the parties in the respective schedules to the partition deed, and inferred that if the suit property is included in the share of the plaintiff, then he would have a much greater extent than what was allotted to the defendant.

5. The appeal was not admitted and notice was served on the respondent and he has entered appearance.

6. The learned counsel for the appellant would submit that there is no allegation by the defendant that the partition deed was vitiated by fraud, or by any facts that would vitiate a contract. He would argue that in the written statement the defendant has even conceded that the partition deed must be so constructed as to declare that both the plaintiff and the defendant have half share each over the suit property.

7. Responding the same, the learned counsel for the respondent/defendant would contend that what was stated in the written statement about sharing the suit property equally between the parties is the worst case scenario which the defendant has pleaded, and that it is not his first line of defence. According to him, when the property was already included in the B-schedule in the partition deed, nothing survives to include it in the C-schedule again, and accordingly, the right of the defendant to whom B-schedule properties in the partition deed was allotted must be up-held. This apart, the first Appellate Court has also not taken into account the oral evidence of the parties, wherein, both the parties have admitted that when they partitioned the properties, their intention was to divide them equally as between them.

8. This is a case relating to construction of certain ambiguity to which Section 97 of the Evidence Act applies. However, both sides did not seem to be ready to argue on this point.

9. The learned counsel for the appellant/plaintiff submitted that the defendant alone was educated and the entire schedule was prepared by the defendant, and he mischievously included an item of the suit property in the B-schedule of the partition deed. He also added that in terms of total land tax payable for B-schedule and C-schedule properties in the partition deed, which finds a mention in the very partition deed, unless the

suit property is taken away from the B-schedule property and included in C-schedule, the total value of the property in C-schedule allotted to the plaintiff in terms of the land tax assessment will be much less.

10. Per Contra, the learned counsel for the defendant/respondent submitted that the appellant/plaintiff herein has examined P.W.2, the uncle of the parties, who even according to the plaintiff was involved in helping the parties to partition the properties, and according to him, there was an intention to divide the properties equally. If this is taken as the criterion, then the total extent allotted under the B-schedule property is 2.81 acres, whereas, the total extent allotted in C-Schedule property is 2.84 acres. If the suit property is taken away from the B-schedule property and added to C-schedule property, the defendant's total holding will be 2.32 acres, whereas, the total extent to which, the plaintiff/appellant would be entitled to is 3.23 acres. In other words, if suit property is added to the plaintiff/appellant's share, then there will be a difference of about 90 cents between the property allotted to the defendant and that which was allotted to the plaintiff which goes to the advantage of the plaintiff.

11. Admittedly, there is an ambiguity in the document since the suit property was included both in the B-schedule as well as in the C-schedule in the partition deed. When an ambiguous document is required to be constructed by the Court, it necessarily needs to probe the intention of the parties to the said document, and such evidence as would aid the court to relate it to the more probable fact. Here, the evidence of PW.2 is significant, since he is equidistant to both the parties. He was also the mediator between them during partition. It is his version that the parties wanted to divide the properties equally between them, while has guided the first Appellate Court to come to the conclusion that the suit property was intended to be included in the "B" Schedule property allotted to the defendant. This is because, including the suit property in the "B" schedule property will make the total extent allotted to both the parties in their respective schedules to the partition deed substantially equal.

12. The interpretation, or rather the construction which the learned counsel for the appellant now wants to put on the partition deed based on the value of the properties to be reckoned from land tax assessment payable for the properties allotted to both the parties, clearly runs against the testimony of his own evidence which he presented before the court through P.W.2. Secondly, this line of parties' intent was not seen confronted to the defendant when he was in the witness box. All

that the plaintiff has pleaded in the plaint was that the suit property was wrongly included in the "B" schedule to the partition deed due to a typographical error, and he does not speak about anything in terms of the valuation of the properties in terms of the tax payable on the properties based on land tax assessment. Even if it is a plausible argument, the fact remains, that there is no pleading on this and no evidence was seen adduced based on this, and the first Appellate Court has accepted one of the possible line construction based on the evidence of PW-2.

13. Since the construction of the document based on a piece of evidence is a finding of fact, the present attempt of the appellant to put forth a new line of construction that goes contrary to the evidence of his own witness P.W.2, is amusing to state the least. Since the issue on construction of the partition deed is founded on evidence, this Court does not consider it necessary to revisit it as it presents no substantial questions of law for this court to consider. Nor does this court find any perversity in the approach of the first Appellate Court.

14. Hence, the second appeal fails and accordingly, stands dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To:

1. The Sub Judge
Hosur.

2.The District Munsif
Hosur.

3.The Section Officer
VR Section, High Court, Madras.

+1cc to Mr.V.Nicholas, Advocate, S.R.No.80853

+1cc to Mr.P.Mani, Advocate, S.R.No.81015

S.A.No.546 of 2008

CNR(CO)

GSP(27/02/2019)